vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6031 OF 1997

Yogeshwar Vikas Sanstha & Ors. ... Petitioners

V/s.

Rajendra T. Shinde & Anr. ... Respondents

Mr.Anilkumar Patil for Petitioners
Mr.Ameya Tamhane for Respondent No.1
Mr.R.M. Patne, AGP, for Respondent No.2

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 13, 2007**

ORAL JUDGMENT:

. The Petitioners have challenged the order of the School Tribunal dated 3.10.1997. Petitioner No.1 is the Institution which runs the school of which Petitioner No.3 is the Headmaster. Petitioner No.2 is the President of Petitioner No.1. The facts in the present case are not in dispute. Respondent No.1 was appointed on 26.7.1995. The appointment order issued to him mentioned that he was appointed temporarily from 28.7.1995 to 30.4.1996. According to the petitioners, Respondent No.1 submitted his resignation, but later filed an appeal before the School Tribunal being Appeal No.7 of 1996 alleging wrongful termination from service. It was contended by Respondent No.1 that he had been appointed against a clear permanent vacancy and, therefore, ought to have been appointed as a probationer

rather than a temporary employee. It was further contended that he had not resigned from service but was in fact prevented from signing the muster roll. Respondent No.1 also pleaded that his appointment was made after following the procedure of advertising the post and selecting him in accordance with law. According to Respondent No.1, his termination from service was illegal as it was effected in breach of the MEPS Act and the Rules framed thereunder.

2. The petitioners filed their reply and pleaded that the appointment order indicated that Respondent No.1 had been appointed only for a temporary vacancy and that he was not entitled to any relief in the appeal. It was pointed out that the appointment of Respondent No.1 was not against a clear permanent vacancy. The petitioners also denied that they have compelled Respondent No.1 to submit his resignation. In fact, according to the Petitioners, the appellant had abandoned his service from 1.2.1996.

3. The School Tribunal has, after considering the pleadings on record and other material before it, held that Respondent No.1 had been appointed in accordance with law after undergoing a selection process. He was appointed in a clear permanent vacancy and, therefore, ought to have been appointed not, as a temporary workman

but as a probationer in accordance with section 5(2). The School Tribunal rejected the plea of the petitioners that the respondent had voluntarily submitted his resignation. The Tribunal observed that the resignation was not placed on record and, therefore, disbelieved the petitioner's contention. Apart from this, it was noticed that the petitioners had not placed on record any document indicating that they had accepted the resignation submitted by Respondent No.1. It is for these reasons that the Tribunal did not accept the contention of the petitioners that Respondent No.1 had resigned. The Tribunal did not consider the fact that Respondent No.1 was appointed in contravention of the Rules framed under the MEPS Act which stipulate that an employee must be appointed on probation for two years in a clear permanent vacancy. He cannot be appointed only for one year. The Tribunal then held that the services of Respondent No.1 had been terminated by the petitioners in violation of Rule 28 of the MEPS Rules. The Tribunal then granted reinstatement with continuity of service and backwages from 17.7.1996.

4. It is submitted on behalf of the petitioners by the learned advocate appearing for them that when the order of appointment discloses that the appointment was only for the period stipulated therein, the Tribunal has erred in concluding that Respondent No.1 was entitled to

be reinstated in service. He submits that the period of employment was over on 30.4.1996 and the workman had stopped attending work after that date. According to the learned advocate, the workman can have no grievance especially since he has submitted his resignation on 31.1.1996 after which date he stopped reporting for duty. The learned Advocate submits that the appointment of Respondent No.1 being temporary, he was not entitled to any relief from the School Tribunal in view of the fact that the temporary period had come to an end. The learned Advocate has not denied that the appointment was against a clear permanent vacancy. However, the thrust of his arguments is that Respondent No.1 was not liable to be reinstated since his appointment was as a temporary employee for a temporary period and not against a permanent clear vacancy.

5. The learned advocate appearing for Respondent No.1 submits that in his statement of claim filed before the Tribunal, he has contended that he was entitled to be appointed as an employee on probation for a period of two years after which he would have been deemed to be permanent. The learned Advocate submits that the Tribunal has committed no errors of law apparent on the face of the record, nor is the order impugned perverse. In these circumstances, it is submitted that there is no need for this Court to interfere with the order of the

Tribunal. The learned advocate for Respondent No.1 also urges that the appointment letter itself was incorrectly issued to the Respondent No.1 as it ought to have mentioned that he was appointed against a clear permanent vacancy and on probation for two years. The learned advocate relies on the judgments in *National Education Society's High School and Junior College v/s. Mrs.Lulomool Monachary,* **1987(2) Bom. C.R. 521** and the **Maharashtra Shikshan Sanstha & Anr. v/s. The Presiding Officer, School Tribunal & Ors., 2007(2) ALL MR 269.**

6. A perusal of the appointment order which is placed on record indicates that the order was issued on 25.7.1995. The appointment order further mentions that Respondent No.1 was being appointed for the period from 28.7.1995 to 30.4.1996. However, the Tribunal has concluded on the basis of the evidence and other material on record that there was a clear permanent vacancy which was available and, therefore, Respondent No.1 ought to have been appointed to the post as a probationer. This is a finding of fact which need not be disturbed by the Writ Court. Under section 5(2) of the MEPS Act an employee who is appointed against a permanent, clear vacancy is liable to be appointed on probation for two years. Thus the initial appointment of Respondent No.1 ought to have been for a duration of 2 years as a probationer. He would thereafter be

entitled to be deemed permanent under the provisions of the Act. The Tribunal has also rightly held that the termination of service was in breach of the MEPS Rules and hence, the order of termination was bad. The Tribunal has rightly concluded that the petitioner had compelled Respondent No.1 to resign from duty and in these circumstances came to the conclusion that the termination was bad.

7. The learned advocate for the Respondents brings to my notice the judgment of a learned Single Judge of this Court in the case of *The Maharashtra Shikshan Sanstha & Anr. v/s. The Presiding Officer, School Tribunal & Ors.,* **2007(2) ALL MR 269** where the learned Single Judge (B.P. Dharmadhikari, J.), sitting at Nagpur bench has held that merely because the appointment order uses the word "temporary" or provides for automatic termination, it does not become a temporary appointment. What is required to be noticed according to the learned Judge is the character of such an appointment; whether the appointment has been made against a clear permanent vacancy or not. The use of the word "temporary" does not indicate that the appointment is in fact a temporary appointment in terms of Rule 10 of the MEPS Rules and therefore, such an appointment is to be viewed as an appointment on probation. In the present case, there is a finding of

fact recorded by the School Tribunal that the respondent was appointed against a clear vacancy. That being the position, though the letter of appointment does mention that the appointment is only for a specified period, the appointment must be considered as one on probation.

8. I am in respectful agreement with the view taken by B.P. Dharmadhikari, J. in the aforesaid case. Thus, in my view, the decision of the Tribunal cannot be faulted.

9. On the question of backwages, the learned advocate for the respondent has submitted that if it is held that the respondent is a probationer then after completion of two years of service, he would be entitled to be deemed a permanent employee of the school. That being the position, he would be entitled to be reinstated as a permanent employee with continuity of service and would be entitled to salary for the period of his unemployment. He relies on the judgment in the case of *Progressive Education Society & Ors. v/s. Nitin Krishnarao Nimbalkar & Ors.*, **2006(5) ALL MR 95** where the Division Bench of this Court has held that where the employee is forbidden from performing his duties for no fault on his part and entirely on account of an arbitrary action of the management, the employee

would certainly be entitled to the entire backwages. In the present case the respondent has been kept out of service due to no fault of his. The tribunal has taken into account the fact that the Respondent was not employed elsewhere after his services were terminated. In my opinion, there is no error of law committed by the Tribunal in granting backwages. The findings of the Tribunal are based on cogent evidence and cannot be labelled as perverse.

10. Petition dismissed. Rule discharged. No costs.